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The Cost of Free Speech: Combating Fake News or Upholding the First Amendment?

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NOTES

The Cost of Free Speech: Combating Fake News or Upholding the First Amendment?

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This Note examines the pervasive and evolving "fake news" problem. Specifically, it explores whether the United States government could pass legislation, modeled after a recently passed German law, regulating propagandistic social media posts. The answer to this question, in short, is no. By comparing the German Basic Law and the U.S. Constitution, this Note highlights the stringency of U.S. First Amendment protections and underscores the U.S. government's inability to combat fake news through legislation. While this Note primarily focuses on the prevalence of fake news in the context of the 2016 U.S. presidential election, related developments and areas of research continue to emerge. Nevertheless, the underlying analysis and conclusions this Note sets forth can be applied to the 2020 U.S. presidential election as well as the local, state, and congressional elections that have since occurred. Indeed, 2020 has proven that the fake news problem remains omnipresent, and the government is still unable to regulate it.

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INTRODUCTION

The amazing growth of social networking and online media over the last twenty years has given rise to what many call a "fake news"[1] epidemic.[2] The dissemination of false information—aimed to

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[1] *See* Ryan Kraski, *Combating Fake News in Social Media: U.S. and German Legal Approaches*, 91 ST. JOHN'S L. REV. 923, 923–24 (2017) (defining "fake news" in context of social media and relatively new phenomena of instant, internet media "reporting").

[2] *See* Andrea Diaz, *'Misinformation' Is Crowned Dictionary.com's Word of the Year*, CNN (Nov. 26, 2018, 6:52 PM), https://www.cnn.com/2018/11/26/us/misinformation-dictionary-word-of-the-year-2018-trnd/index.html. In fact, in 2018, "misinformation" was deemed the word of the year. *Id.* Additionally, "fake news" was used so much, that Oxford English Dictionary now recognizes it as an official word. *See New Words list October 2019*, OXFORD ENG.

influence democratic elections[3] and to incite hate[4]—has spread across the globe. Countries are now faced with a predicament: pass legislation to combat fake news or refrain from regulation due to free speech laws.[5]

Part I of this Note defines the term "fake news" and highlights the present dialogue surrounding the phenomena. Part II then explores a statute, passed in Germany, regulating social media posts. The statute, the Network Enforcement Act[6] (the "NEA"), requires social media companies to remove criminal content from their sites. This Part also explores German Basic Law and whether the NEA would be considered constitutional by exploring German freedom of expression doctrine.[7] Part III then analyzes whether a similar law to the NEA, if passed in the United States, would be constitutional or violate the First Amendment.

Lastly, this Note will discuss counter-speech as a viable alternative to combating fake news propaganda online.[8] Specifically, this Note argues that counter-speech, as it stands in the United States, is not as effective as it could be. By comparing the United Kingdom's news infrastructure, specifically the British Broadcasting Corporation ("BBC") network, to the current public broadcasting networks in the United States, this Note highlights the shortcomings of the

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DICTIONARY (Oct. 2019) https://public.oed.com/updates/new-words-list-october-2019/.

[3] *See infra* Part I.B.

[4] *Id*.

[5] *See* Molly Quell, *More Countries Pass 'Fake News' Laws in Pandemic Era*, COURTHOUSE NEWS SERVICE (June 5, 2020), https://www.courthousenews.com/more-countries-pass-fake-news-laws-in-pandemic-era/; Ashley Westerman, *'Fake News' Law Goes into Effect in Singapore, Worrying Free Speech Advocates*, NPR (Oct. 2, 2019), https://www.npr.org/2019/10/02/766399689/fake-news-law-goes-into-effect-in-singapore-worrying-free-speech-advocates.

[6] Netzwerkdurchsetzungsgesetz [NETZDG] [Network Enforcement Act], Sept. 1, 2017, BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] I at 3352 (Ger.); *official translation at* http://perma.cc/72JK-3KNM [hereinafter NetzDG].

[7] *See* GRUNDGESETZ [GG] [BASIC LAW] [CONSTITUTION], art. 5 (Ger.) [hereinafter [GG] [BASIC LAW]], *translation at* https://www.gesetze-im-internet.de/englisch_gg/.

[8] *See* Daniel Jones & Susan Benesch, *Combating Hate Speech Through Counterspeech*, BERKMAN KLEIN CENTER FOR INTERNET & SOC. AT HARVARD UNIV. (Aug. 9, 2019), https://cyber.harvard.edu/story/2019-08/combating-hate-speech-through-counterspeech.

U.S. news infrastructure. This Note concludes by arguing that the U.S. government should invest in the Corporate Public Broadcasting (the "CPB") to increase the quality, quantity, and reliability of counter-speech efforts in the United States.

I. WHAT IS FAKE NEWS?

A. *Definition*

Fake news[9] is not a new concept.[10] Since the inception of the newspaper, and even before then, there has been truth manipulation, propaganda, and the dissemination of false information throughout society.[11] However, the term "fake news"[12] has many different meanings. The definition of fake news, for the purpose of this Note, refers to the phenomenon of false, unsupported assertions of fact or information spreading across the internet, specifically the unique misinformation posted on social media for political purposes.[13] This misinformation can have disastrous consequences for the

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[9] Kraski, *supra* note 1, at 923–24 (defining "fake news" in the context of social media and the relatively new phenomena of instant, internet media "reporting").

[10] *See* Steven Seidenberg, *Fake News Has Long Held a Role in American History*, A.B.A. J. (July 1, 2017), http://www.abajournal.com/magazine/article/history_fake_news; Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 846 n.1 (2018).

[11] *See* Shankar Vendatam et al., *Fake News: An Origin Story*, NPR (June 25, 2018, 9:00 PM), https://www.npr.org/2018/06/25/623231337/fake-news-an-origin-story.

[12] *See* Kraski, *supra* note 1, at 923–24 (defining "fake news" in context of social media and relatively new phenomena of instant, internet media "reporting"); Ashley Smith-Roberts, *Facebook, Fake News, and the First Amendment*, 95 DENV. L. REV. ONLINE 118, 119 (2018) ("The Booking Institution defines fake news as content 'generated by outlets that masquerade as actual media sites but promulgate false or misleading accounts designed to deceive the public.'"); Nina I. Brown & Jonathan Peters, *Say This, Not That: Government Regulation and Control of Social Media*, 68 SYRACUSE L. REV. 521, 521–22 (2018) (defining fake news as "a media product fabricated and disguised to look like credible news that is posted online and circulated via social media.").

[13] Miles Parks, *Social Media Usage Is at An All-Time High. That Could Mean A Nightmare for Democracy*, NPR (May 27, 2020, 5:02 AM), https://www.npr.org/2020/05/27/860369744/social-media-usage-is-at-an-all-time-high-that-could-mean-a-nightmare-for-democr.

democratic process.[14] For instance, misinformation online destabilizes the truth, making it harder for people to discern what is real and what is false.[15] This destabilization can lead people to form opinions and thoughts on false facts, which in turn influence how they vote in elections.[16]

B. *Fake News in Real Life*

Fake news is disseminated across social media platforms every day.[17] The propagation of such information has, arguably, greatly impacted public life and democratic political processes as a whole.[18] It is almost impossible to watch the nightly news or listen to a political press conference without hearing the term "fake news."[19] According to one study, in 2016 alone, the twenty largest fake news stories posted online, many centering around the presidential election, "generated 8.7 million shares, reactions, and comments" on social media.[20] In contrast, the top twenty news stories from legitimate news sites only generated 7.4 million interactions.[21]

As the term fake news continues to proliferate political dialogue, many believe that it poses a "unique threat" to informed

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[14] *See* Sabrina Tavernise & Aidan Gardiner, *'No One Believes Anything': Voters Worn Out by a Fog of Political News*, N.Y. TIMES (Nov. 18, 2019), https://www.nytimes.com/2019/11/18/us/polls-media-fake-news.html. These consequences may be complete disengagement from the democratic process, and mistrust of the news altogether, creating a "new normal" in society where "[m]any people are numb and disoriented, struggling to discern what is real." *Id.*

[15] *See* Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO L.J. (forthcoming 2020) (manuscript at 21).

[16] *See* Nat Stern, *Judicial Candidates' Right to Lie*, 77 MD. L. REV. 774, 781 (2018) ("[D]issemination of misinformation to the voting public threatens to defeat the very promise of democratic self-government. The success of this system depends on the ability of citizens to make reasoned choices about the alternative visions they are offered.").

[17] *See* Theodore Weng, *Social Media Has Been Hiding a Fake News Problem*, L. TECH. TODAY (Aug. 17, 2020), https://www.lawtechnologytoday.org/2020/08/social-media-has-been-hiding-a-fake-news-problem/.

[18] *See* Stern, *supra* note 16.

[19] *See, e.g.*, *Fake News*, NPR, https://www.npr.org/tags/502124007/fake-news (last visited Jan. 24, 2021).

[20] Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS INST. (Dec. 18, 2017), https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/.

[21] *Id*.

democracies.[22] Fake news has, thus, raised concern across the globe, posing the question of whether social media companies should bear the responsibility of regulating the content posted on their sites.[23] This concern centers particularly around Russian interference in the 2016 United States presidential election, the 2016 Brexit vote in the United Kingdom, and the 2017 election of President Macron in France.[24]

In the United States, a grand jury indicted thirteen Russian individuals for their connection to what the U.S. Department of Justice called a "[s]cheme to [i]nterfere in the United States [P]olitical [S]ystem."[25] The interference in the 2016 presidential election allegedly had two prongs: (1) "the hacking and leaking of e-mails from the Democratic National Committee and Hillary Clinton's campaign chairman, John Podesta" and (2) "a campaign of misinformation and propaganda carried out largely over social media."[26] The indictment, however, only relates to the second prong.[27]

In the years since the 2016 election, it has become even more clear how deeply Russian "troll farms" infiltrate social media sites

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[22] Nabiha Syed, *Real Talk about Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. F. 337, 337 (2017).

[23] *See* Giancarlo F. Frosio, *Why Keep a Dog and Bark Yourself? From Intermediary Liability to Responsibility*, 26 INT'L J. L. & INFO. TECH. 1, 1 (2017) (discussing theory of intermediary liability and its application to social media companies); Liat Clark, *Facebook and Twitter Must Tackle Hate Speech or Face New Laws*, WIRED UK (Dec. 5, 2016), https://www.wired.co.uk/article/us-tech-giants-must-tackle-hate-speech-or-face-legal-action (arguing that social media companies should prioritize critical thinking to tackle fake news).

[24] Jan van der Made, *Russian Outlets Sparked Macron's Fake News Law Plan*, Analysts, RFI (Jan. 4, 2018, 5:17 PM), http://en.rfi.fr/europe/20180104-france-fake-news-law-macron-russia-angry-deny-sputnik-rt.

[25] *See* Press Release, U.S. Dep't of Justice, Grand Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the United States Political System (Feb. 16, 2018) [hereinafter U.S. Dep't of Justice Press Release], https://www.justice.gov/opa/pr/grand-jury-indicts-thirteen-russian-individuals-and-three-russian-companies-scheme-interfere.

[26] Adrian Chen, *What Mueller's Indictment Reveals about Russia's Internet Research Agency*, NEW YORKER (Feb. 17, 2018), https://www.newyorker.com/news/news-desk/what-muellers-indictment-reveals-about-russias-internet-research-agency.

[27] *See* U.S. Dep't of Justice Press Release, *supra* note 25.

and flood them with misinformation.[28] According to one study,[29] which has tracked Russian online information operations since 2014, Russia used thousands of botnets, teams of paid human "trolls," and networks of websites and social-media accounts to "amplify" false or misleading internet posts.[30] Specifically, the study reveals that Russia disseminated propaganda material online to: (1) "tarnish democratic leaders or undermine institutions"; (2) weaken both "citizen and investor confidence" in capitalist economies; (3) magnify social issues; and (4) "promote fear of global calamity."[31]

The study also explicitly states that there were "a number of technical indicators," that Russian propaganda affected the 2016 United States presidential election.[32] Most telling was the "synchronization of messaging and disinformation" by thousands of Russian bots.[33] Collectively, these bots were posting massive amounts of disinformation online, flooding the internet with hundreds of posts a day.[34] The study also revealed that Russia's activities on social media "could tip the balance of an electoral outcome by influencing a small fraction of a voting public,"[35] and that social media in general can effect controversial political decisions such as the Brexit vote and other political elections across the globe.[36]

Overall, Clint Watts, one of the co-authors of the study, a fellow at the Foreign Policy Research Institute, and senior fellow at the Center for Cyber and Homeland Security at George Washington University, stated that Russian propaganda online advanced a

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[28] The Daily, *The Sunday Read: 'The Agency'*, N.Y. TIMES (Sept. 20, 2020), https://www.nytimes.com/2020/09/20/podcasts/the-daily/russia-trolls-misinformation.html (discussing a Russian communications agency, "The Internet Research Agency" that employed thousands of people to act as internet "trolls" whose job was to interfere in American society and elections).

[29] Andrew Weisburd et al., *Trolling for Trump: How Russia Is Trying to Destroy Our Democracy*, WAR ON ROCKS (Nov. 6, 2016), https://warontherocks.com/2016/11/trolling-for-trump-how-russia-is-trying-to-destroy-our-democracy/.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] Weisburd et al., *supra* note 29.

[35] *Id*.

[36] *Id*.

political agenda to "erode trust in mainstream media, public figures, government institutions—everything that holds the unity of the Republic together."[37]

II. THE GERMAN SOLUTION TO FAKE NEWS

In Germany, fake news and the effect of online propaganda on society was a growing problem.[38] After the *Charlie Hebdo* attacks in Paris in 2015, the dissemination of hate speech and propaganda online inched towards center stage in German politics.[39] That same year, the Federal Ministry of Justice and Consumer Protection "set up a 'task force' to address the problem."[40] However, by 2016, the German government was dissatisfied with the providers' self-regulation.[41] The German government resolved that self-regulation had to be supplemented by government regulation.[42] With the goal of improving the enforcement of existing laws on illegal speech online, the NEA[43] was introduced.[44]

While this Part is non-conclusive as to the constitutionality of the NEA, it provides an illustrative look at why the Act is likely

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[37] Jill Dougherty, *The Reality Behind Russia's Fake News*, CNN (Dec. 2, 2016), https://www.cnn.com/2016/12/02/politics/russia-fake-news-reality/index.html.

[38] *See* Amol Rajan, *Germany Leads Fightback Against Fake News*, BBC (Feb. 16, 2017), https://www.bbc.com/news/entertainment-arts-38991973.

[39] Imara McMillan, *Enforcement Through the Network: The Network Enforcement Act and Article 10 of the European Convention on Human Rights*, 20 CHI. J. INT'L L. 252, 257–60 (2019).

[40] Thomas Wischmeyer*, 'What is Illegal Offline is Also Illegal Online'—The German Network Enforcement Act 2017*, FUNDAMENTAL RTS. PROT. ONLINE: FUTURE REGUL. INTERMEDIARIES 2 (2019). The task force consisted of representatives from the largest social media companies, including Twitter and Facebook, who all promised to increase their internal mechanisms to remove illegal posts. *Id*. at 2–3.

[41] *See id*. at 4 (citing Press Release, jugendschutz.net, 'Löschung rechtswidriger Hassbeiträge bei Facebook, YouTube und Twitter' (Sept. 26, 2016), https://www.bmjv.de/SharedDocs/Downloads/DE/News/Artikel/031420 17_Monitoring_jugendschutz.net.pdf (discussing German Federal Ministry of Justice and Consumer Protection study of social media providers' removal of illegal content).

[42] *See id.* at 5.

[43] NetzDG, *supra* note 6, § 3, ¶ 2.

[44] McMillan, *supra* note 39, at 259–60.

constitutional and underscores the contrasts between German Basic Law and the U.S. Constitution. These differences will be relevant to a proceeding discussion within this paper about why a similar law to the NEA would be unconstitutional in the United States.

A. *The Network Enforcement Act*

In January 2018, Germany began enforcing a new law called Netzwerkdurchsetzungsgesetz, or the NEA,[45] which compels social media platforms to remove any content deemed unlawful within seven days from the receipt of a complaint.[46] The providers also have twenty-four hours to remove content that is "manifestly unlawful," after being notified of it.[47] The NEA bans specific speech, enumerated in the German Criminal Code,[48] including the "[d]issemination of propaganda material of unconstitutional organisations."[49] The entire basis of the Act is to protect citizens from illegal and harmful speech, including hate speech and "'fake news'"[50] and to

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[45] *Id.* at 254; NetzDG, *supra* note 6, § 6.

[46] NetzDG, *supra* note 6, § 3, ¶ 2.3.

[47] *Id.* at § 3, ¶ 2.2.

[48] STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b, 184d, 185–187, 201a, 241, 269 (Ger.), *translation at* https://perma.cc/A6EV-LPWZ (relevant offenses include the dissemination of propaganda material of unconstitutional organizations (section 86 STGB), the preparation of a serious violent offence endangering the state (section § 89a STGB), public incitement to commit a crime (section 111 STGB), the forming of criminal and terrorist organizations (section 129 to section 129b STGB), inciting hatred (section 130 STGB), the dissemination of depictions of violence (section 131 STGB), the defamation of religions, religious and ideological associations (section 166 STGB), the distribution, acquisition, and possession of child pornography (section 184b and section 184d STGB), insult and defamation (section 185 to 187 STGB), the violation of intimate privacy by taking photographs (section 201a STGB), and threats of committing a felony (section 241 STGB)).

[49] *Id.* at § 86.

[50] German Government letter responding to David Kaye, Special Rapporteur (Aug. 9, 2017), https://perma.cc/8K9B-3YC8 (arguing that measures taken through the NEA were necessary in wake of fake news era, Russian interference in foreign elections through social media, and rampant radicalization of hate groups online); *see* David Kaye, Special Rapporteur on the Promotion and Protection of the Right of Freedom of Opinion and Expression, Letter to the German Government (June 1, 2017) (on file with the U.N. at U.N. Doc. OL/DEU/1/2017), https://perma.cc/7WNL-ML9A.

increase the transparency and responsibility of social media companies regarding technological systems for removing such content.[51] The NEA has been criticized for its infringement on free speech rights,[52] yet the German government has staunchly supported the opposite, stating that the NEA protects German civil rights.[53]

It is not currently possible to predict how the German courts might deal with the freedom of expression issues posed by the enactment of the NEA. The German Federal Constitutional Court ("GFCC") has not ruled explicitly on the fundamental rights implications of online monitoring.[54] The following analysis is, therefore, hypothetical and based solely on German free speech case law. However, there are reasons, based on current German freedom of expression doctrine, to think that the GFCC may uphold the legislation as acceptable.[55] First, the German Basic Law has set forth

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[51] Deutscher Bundestag, 'Begründung zum Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken' (BT-Drs. 18/12356) (May 16, 2017), https://www.computerundrecht.de/1812727.pdf [https://perma.cc/SLD4-DACA] [Explanatory Memorandum to the Network Enforcement Act] (stating that there is a need to improve law enforcement in social networks in order to promptly remove objectively criminal content, such as "incitement, insult, defamation, or disruption of public peace by faking offenses").

[52] Josie Le Blond, *In Germany, A Battle Against Fake News Stumbles into Legal Controversy*, WORLD POLICY (June 12, 2017), https://worldpolicy.org/2017/06/12/in-germany-a-battle-against-fake-news-stumbles-into-legal-controversy/.

[53] *See Tough New German Law Puts Tech Firms and Free Speech in Spotlight*, IRISH TIMES (Jan. 5, 2018, 5:20 PM), https://www.irishtimes.com/business/technology/tough-new-german-law-putstech-firms-and-free-speech-in-spotlight-1.3346155 [https://perma.cc/7ZP8-62AZ] (quoting Justice minister Heiko Maas saying, "'Incitement to murder, threats, insults and incitement of the masses or Auschwitz lies are not an expression of freedom of opinion but rather attacks on the freedom of opinion of others.'").

[54] *See* Press Release, Bundesverfassungsgericht (Federal Constitutional Court), Obligation to unlock a Facebook account in temporary legal protection (May 22, 2019), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2019/bvg19-038.html (summarizing court's decision in a case concerning removal of content by Facebook in compliance with NEA and subsequent removal of plaintiff's account, highlighting that it is unclear under constitutional law whether either of those actions infringe on any basic rights); BVERFGE, BVQ 42/19 (May 22, 2019), https://www.bundesverfassungsgericht.de/e/qk20190522_1bvq004219.html (original decision).

[55] *See* Wischmeyer, *supra* note 40, at 11–17 (suggesting that the NEA may be constitutional); *infra* Part II.B for exploration of German Basic Law.

explicit limits on free speech.[56] Second, false facts receive less, or even no, protection.[57] Third, even protected speech, such as opinions, is subject to a balancing test against other rights.[58]

B. *German Basic Law*

Post-World War II, Germany called for an abandonment of the previous Nazi regime, and the brutally authoritarian government it represented.[59] The Bonn Constitution, or "Basic Law,"[60] created in 1949, aims to create a system of values based on the dignity of human beings, [61] and the concept of individual rights.[62] The Basic Law begins by stating: "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[63] The principal of human dignity, under the Basic Law, sits at the top of a system of ordered values.[64] This hierarchy is imperative to understanding the constitutional jurisprudence of Germany.

The hierarchy of values means individual rights such as freedom of expression are not absolute.[65] For instance, human dignity, liberty, preservation of democratic order, democratic integrity, equality, personal inviolability, and physical integrity are all examples of general values that may be weighed more heavily against the

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[56] *See infra* Part II.C.

[57] *See infra* Part II.C.1.

[58] *See infra* Part II.C.2.

[59] *See* Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 248 n.1 (1989).

[60] [GG] [BASIC LAW], *supra* note 7; *see* Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 S.M.U. L. REV. 477, 481 (2000).

[61] *See* BASIL S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE 29 (4th ed. 2002) ("A principal aim of the Constitution of Bonn of 1949 . . . was to establish unequivocally the liberal, social, democratic order of the new state based on the principal of legality.").

[62] Quint, *supra* note 59, at 249.

[63] [GG] [BASIC LAW], *supra* note 7, art. 1, § 1.

[64] *See* Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 321–23 (1999).

[65] *See* DONALD P. KOMMERS & RUSSEL A MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 442 (3d ed. 2012).

freedom of expression.[66] This ordering of values distinguishes German free speech law from its American counterpart.[67] Indeed, faced with a clash, under American free speech jurisprudence, free speech usually triumphs.[68] In sum, the rights enumerated in the Basic Law must conform to this order of values, with human dignity at its core.[69]

C. *The Freedom of Expression in German Basic Law*

Article 5 of the Basic Law grants the right of freedom of speech[70] while simultaneously stating that such rights "find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honor."[71] It is clear from these limitations that the freedom of expression is not intended to be an absolute value.[72] Under German jurisprudence, each constitutional right and liberty is interrelated and must be reconciled with one another.[73] Article 5,[74] therefore, is subject to explicit limitations within other general laws,[75] but it must also "be reconciled with the

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[66] [GG] [BASIC LAW], *supra* note 7, art. 1–4 (These rights are listed and guaranteed in the German Basic Law, which is organized as a hierarchical system of values.); *see* ULRICH KARPEN, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 13 (1988). Additionally, the freedom of expression is not "guaranteed unlimited" but must be balanced with these other, more highly ranked, rights. *Id.* at 93.

[67] *See* Ronald Dworkin, *The Coming Battles Over Free Speech*, N.Y. REV. (June 11, 1992), https://www.nybooks.com/articles/1992/06/11/the-coming-battles-over-free-speech/ ("The United States stands alone, even among democracies, in the extraordinary degree to which its [C]onstitution protects freedom of speech and of the press.").

[68] *See infra* Part III.B.

[69] *See* KOMMERS & MILLER, *supra* note 65, at 353 ("[These rights enumerated in the Basic Law] have been proclaimed with an important German twist: they are to be exercised responsibly and used to foster human dignity within the framework of ordered liberty.").

[70] [GG] [BASIC LAW], *supra* note 7, art. 5, § 1.

[71] *Id*. at art. 5, § 2.

[72] *See id.*

[73] *See* KOMMERS & MILLER, *supra* note 65, at 57.

[74] [GG] [BASIC LAW], *supra* note 7, art. 5.

[75] *See* Douglas-Scott, *supra* note 64, at 321 ("Freedom of expression is an essential feature of the German Constitution. The free expression provisions of German Constitutional law, however, interact with measures in the German

rights and liberties of other persons and groups as well as with other individuals and social interests recognized by the constitution."[76] Under the Basic Law, in a clash between freedom of expression and other rights or liberties, freedom of speech may lose.[77] German courts, moreover, must balance[78] the right to freedom of expression with other constitutional rights, such as the right to human dignity and the preservation of democratic order, to ensure that all values of the rights in question are properly protected.[79] For instance, expressions of opinion are generally protected under the Basic Law.[80] However, the "expression of [an] opinion [that] encroaches" on another person's right to personality or human dignity may not be protected.[81]

Criminal Code designed to prohibit racist expression in a way that would not be possible under American law.").

[76] *See* KOMMERS & MILLER, *supra* note 65, at 442.

[77] *See* Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 831–32 (1997). In this balancing test, certain speech is granted more weight than others. In Germany, "[s]peech is valued according to its utility in promoting desirable ends." *Id.* at 805; *see infra* Part II.C.2 (discussing cases in German jurisprudence where other basic rights were upheld over right to free expression).

[78] *See* KOMMERS & MILLER, *supra* note 65, at 66 (discussing the balancing objective of German Constitutional analysis).

[79] *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 198 (Ger.)] [hereinafter *Lüth*, 7 BVerfGE 198] [https://germanlawarchive.iuscomp.org/?p=51, *translated in* KOMMERS & MILLER, *supra* note 65, at 443–44. Rather than interpreting *Lüth*'s Article 5 right to free speech and deciding the case based on those constitutional merits alone, the Court balanced whether the speech infringed on any constitutional interests of Harlan, the moving party, or violated any protections provided under "'general laws.'" *Id*. at 447. The Court rejected the argument that complainant should have refrained from "boycotting out of regard for Harlan's professional interests and economic interests." *Id*. at 448. While the free speech claim in the *Lüth* case technically won, the Federal Constitution Court nonetheless established that constitutional interests in speech must be balanced with "'general laws'" that represent community or individual interests. *See* Quint, *supra* note 59, at 286 (discussing balancing test established in *Lüth*).

[80] *Lüth*, 7 BVerfGE 198, *supra* note 79, *translated in* KOMMERS & MILLER, *supra* note 65, at 445 ("The basic right to freedom of opinion, as the most immediate expression of the human personality living in society, is one of the noblest of human rights.").

[81] *See* KOMMERS & MILLER, *supra* note 65, at 446.

Certain speech, moreover, is excepted from constitutional protection altogether: expressions that threaten the democratic social order,[82] violence,[83] speech that undermines human dignity (e.g., "hate speech" as we know it in the United States),[84] group defamation, and incitement.[85] In contrast, American constitutional law protects speech advocating illegal conduct,[86] hate speech,[87] and lies.[88]

In cases against government regulation under German law, an interference with the freedom of expression can be justified by the provisions of general laws, provisions for the protection of young persons, or the right to personal honor.[89] It is important to note that, while the Basic Law places statutory limits on the freedom of

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[82] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Mar. 7, 1990, 81 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 278 (Ger.), *translated in German Case: Bundesflagge Decision,* Foreign Law Translations, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=632 ("The flag serves as an important integration device through the leading state goals it embodies; its disparagement can thus impair the necessary authority of the state.").

[83] *See id.* (finding the legislature can pass laws preventing children from gaining access to materials that glorify violence or crime, provoke racial hatred, glorify war, or depict sexual acts in a crude, offensive, and shameful manner).

[84] *See* KOMMERS & MILLER, *supra* note 65, at 471 ("Thus, freedom of opinion must always take second place where the statement actually affects another's human dignity.") (quoting Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 266 (Ger.)).

[85] *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Apr. 13, 1994, 90, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 241 (Ger.), [hereinafter *Holocaust Denial* 90 BVerfGE 241], *translated in* KOMMERS & MILLER, *supra* note 65, at 493–97.

[86] *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (holding that Brandenburg did not incite or produce imminent lawless action by making a speech at a KKK rally and, therefore, Ohio statute criminalizing syndicalism violated Brandenburg's First Amendment rights).

[87] *See* R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.").

[88] *See* NAACP v. Button, 371 U.S. 415, 445 (1963) (constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered").

[89] [GG] [BASIC LAW], *supra* note 7, art. 5, § 2 ("These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.").

expression, the limits themselves have limits.[90] There are differing academic opinions when it comes to defining a "general law."[91] However, Germany's highest court, the GFCC, has determined that a general law is not a law that seeks to prohibit the articulation of an opinion, but rather, its main function is to protect or promote a legally protected interest.[92]

The GFCC must determine the proportionality of the regulation in relation to the rights at issue.[93] Under this principal, the basic rights of German citizens may only be limited if the government restriction is the only means of achieving the specified aims.[94] This "principal of proportionality consists of three requirements."[95] The first requirement is *suitability*.[96] The restriction, in other words, must be able to actually "achieve the purpose intended."[97] The next requirement is *necessity*, or otherwise known as "least interference."[98] Under this element, the restriction is only valid if it is shown that there are no other means to efficiently accomplish the same aims without the interference.[99] Lastly, the restriction must be

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[90] *See* SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 81–83 (1999).

[91] *See* Mehrdad Payandeh, *The Limits of Freedom of Expression in the Wunsiedel Decision of the German Federal Constitutional Court*, 11 GER. L.J. 929, 932–33 (2010) (discussing different interpretations of "general law" by German scholars).

[92] *See id.* at 929, 932 (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 4, 2009, 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE]).

[93] *See* MICHALOWSKI & WOODS, *supra* note 90, at 81–83. The Court also looks to other requirements to determine if a regulation will survive constitutional scrutiny: (1) the restriction must not be of the "essential character[istics] of a basic right"; (2) the restriction cannot be aimed at individual cases; (3) the restriction "must expressly name" the basic right seeking to be limited; (4) there must be legal certainty; and (5) the restriction must adhere to the principal of proportionality. *See id*. However, proportionality is the most relevant to this Note.

[94] *Id*. at 83.

[95] *Id*. at 83–84.

[96] *Id.* at 83.

[97] *Id*.

[98] *See* MICHALOWSKI & WOODS, *supra* note 90, at 83.

[99] *See id*.

appropriate.[100] To determine the appropriateness of the restriction, the GFCC balances the right being limited with the interest being pursued.[101]

This analysis is very similar to strict scrutiny in the United States;[102] however, based on the order of values within the Basic Law, it seems German Courts are more willing to accept a government interest as compelling. Overall, the right to freedom of expression in Germany is not absolute and can be limited by "general laws" and must also be weighed with other rights granted under the constitution.

1. WHAT KIND OF SPEECH IS PROTECTED?

In freedom of expression cases, the German courts must first determine whether a speech is protected under the Basic Law or falls into an exception, e.g., speech of such low value that it is not covered.[103] The GFCC, given the language of Article 5, has had to determine whether the freedom of expression under Article 5(1) protects only opinions, or whether other speech, such as the expression of mere fact, especially false facts, deserves constitutional protection as well.[104] The GFCC has established that opinions are protected, regardless of their content.[105] Statements of fact, on the other hand, are distinguished from opinions.[106] This approach is strikingly different from American constitutional law, where lies or "false fact" still retain full First Amendment protection.[107]

This distinction between opinions and false facts is evident in the *Auschwitz Lie* case where the German Court imposed a prior

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100 *Id*. at 84.

101 *See id*.; *infra* Part C.II.2 (discussing cases in German jurisprudence where these rights are balanced).

102 *See infra* Part III.B.1 (discussing strict scrutiny).

103 *See supra* notes 71–80.

104 *See* MICHALOWSKI & WOODS, *supra* note 90, at 200–03.

105 *See Holocaust Denial* 90 BVerfGE 241, *supra* note 85, *translated in* KOMMERS & MILLER, *supra* note 65, at 493. (stating that opinions are protected by the basic right of art. 5(1)(1)).

106 *See id.* at 493–94 (distinguishing a statement of fact from opinion).

107 Collin v. Smith, 578 F.2d 1197, 1206–07 (7th Cir. 1978) (holding that a Neo-Nazi march purposely held in a predominantly Jewish neighborhood was protected speech and finding an anti-defamation law by which the Village sought to prevent the march invalid).

restraint of a demonstration in support of Holocaust denial.[108] The demonstrators alleged that the court's decision violated their right to exercise their opinions under Article 5.[109] The court asserted that the freedom of opinion, like all rights to speech, are subject to limitations under Article 5(2).[110] These limitations are imposed by statute, and a balancing test is conducted to weigh the basic right with the legal interest that the statute serves.[111] There, the court reasoned that the demonstration was based on a clearly false fact[112]—that the Holocaust never occurred[113]—and, therefore, deserved far less constitutional protection.[114]

2. FREEDOM OF EXPRESSION AND BALANCING

Next, in cases where the freedom of expression clashes with other Basic Law rights, the court must engage in a balancing test

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[108] *See Holocaust Denial*, 90 BVerfGE 241, *supra* note 85, *translated in* KOMMERS & MILLER, *supra* note 65, at 495 (stating that opinions are protected by the basic right of art. 5(1)(1)). This case also highlights an important distinction between American and German freedom of expression jurisprudence: hate speech is not protected under German Basic Law, whereas it is protected speech under the American constitution. *See* Douglas-Scott, *supra* note 64, at 324–27 (discussing the Court's decision to place an injunction on the conference due to its threatened breaches of sections 130 (incitement to hatred) and 185 (insult) of the criminal code); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam) (requiring that violence be imminent before hateful speech may be proscribed).

[109] *See Holocaust Denial*, 90 BVerfGE 241, *supra* note 85, *translated in* KOMMERS & MILLER, *supra* note 65, at 493.

[110] *See Holocaust Denial*, 90 BVerfGE 241, *supra* note 85, *translated in* KOMMERS & MILLER, *supra* note 65, at 495–96; *see also* [GG] [BASIC LAW], *supra* note 7, art. 5, § 2.

[111] *See infra* Part II.C.2 (discussing this balancing test).

[112] *See* Douglas-Scott, *supra* note 64, at 326–27. However, the Court also established that even if the statements in question "were merely opinions rather than statements of [false] fact," the "protection of personal identity over freedom of expression" would still be warranted. *See id*.

[113] *See Holocaust Denial*, 90 BVerfGE 241, *supra* note 85, *translated in* KOMMERS & MILLER, *supra* note 65, at 495 ("[Holocaust denial] is a representation of fact that is demonstrably untrue in the light of in-numerable eye-witness accounts, documents, findings of courts in numerous criminal cases, and historical analysis.").

[114] *Id.* at 496 ("When insulting opinions that contain representations of fact are voiced, it is crucial whether the representations of fact are true or untrue. Demonstrably incorrect representations of fact do not merit protection.").

between the rights at issue.[115] One of the most foundational cases in German jurisprudence is the *Lüth* case, which established the doctrine of an objective order of values and identified standards to be applied by courts in weighing the rights of speech and other basic rights.[116] The dispute in *Lüth* was "between Erich Lüth, a minor official in Hamburg, and Veit Harlan, a former director of racist films under the Nazis."[117] In 1950, "Harlan directed his first post-war movie, *Immortal Beloved*."[118] "Lüth called for a boycott of Harlan's new film,"[119] and Harlan sought an injunction against Lüth that would prohibit Lüth from issuing further calls for a boycott of the film.[120] Finding that Lüth's statements injured the plaintiffs' business, the state court issued an injunction prohibiting Lüth from promoting any more boycotts of Harlan's film.[121] "In response, Lüth filed a 'constitutional complaint' in the Federal Constitutional Court," stating the injunction violated his Article 5(1) right to free expression.[122]

The GFCC ruled that Lüth's constitutional rights were indeed infringed upon.[123] However, through this ruling, the GFCC established pivotal interpretations of Article 5.[124] For one, it solidified the Basic Law as a hierarchy of values.[125] The GFCC held that the lower courts had failed to give the basic value of free speech the proper weight when balancing the right to freedom of expression with the

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115 *See Lüth*, 7 BVerfGE 198, *supra* note 79, *translated in* KOMMERS & MILLER, *supra* note 65, at 444.

116 *See id.* ("[T]he Basic Law is not a value-neutral document. Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights.")

117 *See* Quint, *supra* note 59, at 252–53 and accompanying footnotes (discussing *Lüth*).

118 *Id*.

119 *Id*.

120 *Id*. at 253–54.

121 *See* Quint, *supra* note 59, at 253–54.

122 *Id*. at 254.

123 *Id*.; *see Lüth*, 7 BVerfGE 198, *supra* note 79, *translated in* KOMMERS & MILLER, *supra* note 65, at 448.

124 *See* KOMMERS & MILLER, *supra* note 65, at 449.

125 *See Lüth*, 7 BVerfGE 198, *supra* note 79, *translated in* KOMMERS & MILLER, *supra* note 65, at 443–44 (stating that main purpose of basic rights is to protect individual against encroachment of public power and that Basic Law erects an objective order of values of basic rights).

plaintiff's private rights.[126] The GFCC rejected the argument that Harlan's human dignity was infringed upon,[127] and the balancing test weighed in favor of Lüth's free speech rights.[128] While the free speech claim in *Lüth* technically won, the GFCC, nonetheless, established that free speech rights had to be balanced against other conflicting rights based on their overall objective values within society.[129]

Lebach is another important case in German jurisprudence showcasing the GFCC's balancing test, and how free speech rights can be overridden by other rights. [130] In *Lebach*, the GFCC upheld an injunction against the showing of a documentary television film about a famous robbery of a government ammunitions depot.[131] The documentary referred to the conspirators by name, described the heist with specific facts and accuracy, and highlighted the intimate relationship between the male conspirators.[132] The documentary was to be aired a few years after the robbery and just before the plaintiff prisoner's release.[133]

Despite the accuracy of the film, the court ruled in favor of the bank robbers.[134] It is important to note that the documentary "was not claimed to contain false statements."[135] Rather, the court

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[126] *See id.* at 448 ("[T]he regional court, in assessing the behavior of the complainant, has misjudged the special significance of the basic right to freedom of opinion.").

[127] *See* Quint, *supra* note 59, at 286 and accompanying footnotes (discussing GFCC's finding in *Lüth* that infringement on Harlan's human dignity could only be shown if it was completely excluded from his profession).

[128] *See Lüth*, 7 BVerfGE 198, *supra* note 79, *translated in* KOMMERS & MILLER, *supra* note 65, at 448.

[129] *See* Quint, *supra* note 59, at 286 (discussing the *Lüth* case and the analysis the German Constitutional Court implemented to balance two constitutional values).

[130] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], June 5, 1973, 35, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 202 (Ger.), [hereinafter *Lebach*, 35 BVerfGE 202] [https://germanlawarchive.iuscomp.org/?p=62], *translated in* KOMMERS & MILLER, *supra* note 65, at 479–83.

[131] *Id.* at 479–80, 483.

[132] *Id.* at 480.

[133] *Id.*

[134] *Id.* at 483.

[135] *See* Quint, *supra* note 59, at 300 (discussing the German Constitutional Court's analysis in the *Lebach* case).

emphasized the prisoner's right to human dignity under Article 1 and freedom of personality under Article 2 of the Basic Law.[136] The court interpreted that those rights afforded a person to determine whether and to what extent others might be permitted to portray his life story in general, or certain events from his life.[137] In other words, this right to personality may be equated with privacy rights in the United States.[138] The rights of free reporting under Article 5, Section 1 were then balanced with these rights to human dignity and personality.[139] The court emphasized the importance of the freedom of the press while also reiterating the limitations of this freedom.[140] After balancing each constitutional right at issue, the court determined that the prisoner's right to be free from invasion into his personality, even by true statements, outweighed the right to free reporting.[141]

The outcome of *Lebach* compared to *Lüth* highlights the impact of the balancing of rights. Both cases show that depending on the weight given to free expression versus human dignity, or other competing rights, the law may be speech-restrictive or speech-protective. In *Lebach*, it is clear the court valued human dignity and personality rights over those of free speech[142]—a trend in German jurisprudence beginning with *Lüth* and continuing today.[143] This emphasis on human dignity exposes the wide range of judicial

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[136] *See Lebach*, 35 BVerfGE 202, *supra* note 130, *translated in* KOMMERS & MILLER, *supra* note 65, at 481.

[137] *See id.* at 480. This right, while enumerated in the Basic Law, also rests, in part, on a general law that creates a qualified right to control one's own "picture." *See* Quint, *supra* note 59, at 300 n.173 (citing KUNSTURHEBERGESETZ [KUG] (German copyright law) §§ 22, 23).

[138] *See* Quint, *supra* note 59, at 279–80.

[139] *See id.*

[140] *See Lebach*, 35 BVerfGE 202, *supra* note 130, *translated in* KOMMERS & MILLER, *supra* note 65, at 481 (discussing importance of the freedom of the press, but also its limitations when at odds with other rights enumerated under Basic Law).

[141] *See id*. at 483. A factor in the Court's determination was that the particular broadcast was to be made years after the initial robbery and, therefore, lost any urgency and importance in informing the public of a significant event. *Id*. at 482. Whereas the prisoner's right to develop his personality and reintegrate into society after his release would be severely compromised by such a damaging and exposing documentary. *Id*. at 482–83.

[142] *See* Quint, *supra* note 59, at 299–300.

[143] *See* KOMMERS & MILLER, *supra* note 65, at 442.

decisions possible when the values of certain rights are weighed against one another.[144]

The *Mephisto* case similarly reveals the court's evolution towards greater emphasis on human dignity rights over communicative ones.[145] In a famous 3-3 split,[146] the court effectively upheld an injunction against publication of a novel about a deceased actor.[147] The novel, written by Klauss Mann, was based on Gustaf Gründgens, a famous actor during Nazi control of Germany, and director of the Prussian State Theatre.[148] The main character in the novel, Hendrik Höfgen, made his name by playing the devil in Goethe's "Faust" during the Nazi period and furthered his career by siding with those in power in Nazi Germany.[149] Despite Mann's disclaimer in the forward of the book stating that all characters represented general types and not portraits of specific persons, the court found that the novel defamed the memory of Gründgens, because Höfgen, the character in the novel, paralleled the details of Gründgen's career and life.[150] In this case, unlike the previous two cases, the right at issue was the right to artistic freedom, under Article 5(3) of the Basic Law.[151] While Article 5(3) is not subject to the same explicit limitations as the freedom of expression under Article 5(2),[152] the court established that artistic freedoms are in fact subject to limitations.[153] The court emphasizes that the right to artistic freedom cannot be limited by statute—as the communicative rights can

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144 *See id.*

145 *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Feb. 24, 1971, 30, ENTSCHEIDUNGEN DES BUNDESVERFASSUN GSGERICHTS [BVerfGE] 173 (Ger.) [hereinafter *Mephisto*, 30 BVerfGE 173] [https://germanlawarchive.iuscomp.org/?p=56], *translated in* KOMMERS & MILLER, *supra* note 65, at 519–22.

146 *See* Federal Constitutional Court Law (BVerfGG) § 15(4). Under German law, a tie vote results in the lower court ruling remaining in effect. *Id.*

147 *See Mephisto*, 30 BVerfGE 173, *supra* note 145.

148 Quint, *supra* note 59, at 291.

149 *Id.*

150 *Id*. at 291–92.

151 *See id.*; [GG] [BASIC LAW], *supra* note 7, art. 5, § 3.

152 [GG] [BASIC LAW], *supra* note 7, art. 5, §§ 2, 3.

153 *Mephisto*, 30 BVerfGE 173, *supra* note 145, *translated in* KOMMERS & MILLER, *supra* note 65, at 520 (establishing that the right of artistic liberty is not unlimited).

be—but are limited by the Constitution itself.[154] Therefore, the right to artistic freedom is balanced with the right to human dignity and personality rights,[155] enumerated under Article 1 of the Basic Law.[156] Both *Mephisto* and *Lebach* highlight the court's emphasis on human dignity and personality rights when in conflict with other rights or values, specifically the right to free expression.[157]

Speech in Germany is valued in accordance with its promulgating of desirable ends for society, such as public or political speech, art, academic research, and scientific communication.[158] However, the right to free speech is not unlimited, and if speech conflicts with any other constitutionally appointed rights, it will be analyzed based on its benefit to society in contrast to the conflicting right.[159] Overall, German doctrine differs from the U.S. doctrine in two important ways. First, there are far more "exceptions" to the freedom of expression in Germany, because of the statutory limits written directly into the Basic Law.[160] In the United States, exceptions to protected speech are rare and very limited.[161] Second, because the rights listed under the Basic Law are objectively ordered,[162] the GFCC employs a balancing test when differing rights and interests are at issue.[163] Freedom of expression is typically given less weight in this balance,

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154 *Id.* at 520–21.

155 *See id.* (establishing that if the guarantee of artistic freedom gives rise to any conflict, it must be resolved by construction in terms of the order of values enshrined in the Basic Law).

156 [GG] [BASIC LAW], *supra* note 7, art. 1.

157 *See* Quint, *supra* note 59, at 300, 307 (discussing both holdings in *Mephisto* and *Lebach*).

158 *See* Eberle, *supra* note 77, at 800 (stating that "[s]peech [in Germany] is valued according to its utility in promoting desirable ends"); *see also Mephisto*, 30 BVerfGE 173, *supra* note 145, *translated in* KOMMERS & MILLER, *supra* note 65, at 520; [GG] [BASIC LAW], *supra* note 7, art. 5, § 2.

159 *See* KOMMERS & MILLER, *supra* note 65, at 66.

160 *See* [GG] [BASIC LAW], *supra* note 7, art. 1, §§ 1, 2, 5.

161 *See infra* notes 215–19.

162 *See* KOMMERS & MILLER, *supra* note 65, at 66 (discussing the balancing objective of German Constitutional analysis).

163 *See supra* Part II.C.2 for a discussion of the Court's use of this balancing test.

whereas in the United States, freedom of speech is arguably valued above all other rights.[164]

III. AMERICAN FREE SPEECH LAW

This Part will explore the First Amendment of the United States Constitution, specifically, free speech jurisprudence and theories, and analyze whether a statute, like the Network Enforcement Act, would be constitutional in the United States. Compared to the analysis of German Basic Law, above, U.S. free speech laws are extremely stringent and do not provide much flexibility when it comes to government regulation of fake news.

A. *The First Amendment*

The First Amendment to the Constitution states that "Congress shall make no law . . . abridging the freedom of speech; or of the press . . . ."[165] Note that there are no explicit limitations written into the text.[166] Already, there is a stark contrast between German freedom of expression and U.S. free speech.[167] This distinction will illustrate why free speech under U.S. jurisprudence is protected more often than its German counterpart.

There are four main theories used by the Supreme Court to justify protection of the First Amendment: (1) the promotion of the marketplace of ideas;[168] (2) the promotion of democratic self-

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[164] *See* Brian C. Castello, *The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking* Meese v. Keene, 1989 DUKE L.J. 654, 654 (1989) ("By proscribing that 'Congress shall make no law . . . abridging the freedom of speech . . . ,' the first amendment makes an unequivocal statement that accords with the traditional view of freedom of expression, and significantly restricts the government's power to act directly against individual expression."); Rebecca Zipursky, *Nuts about NETZ: The Network Enforcement Act and Freedom of Expression*, 42 FORDHAM INT'L L.J. 1325, 1343 (2019) ("America has a famously robust conception of free speech. While the first right protected in the German Basic Law is human dignity, the First Amendment of the Bill of Rights protects the freedom to speak.").

[165] U.S. CONST. amend. I.

[166] *See id.*

[167] *See supra* Part II.C.2.

[168] *See* Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 124–25 (2018)

government;[169] (3) the promotion of individual autonomy, self-expression, and self-realization;[170] and (4) a negative theory that promulgates the idea that the citizens of the United States do not trust the government to regulate speech.[171]

The marketplace of ideas theory is frequently used by courts to resolve free speech cases.[172] Under this theory, it is thought that we can best uncover truth and advance knowledge by allowing all ideas, opinions, and viewpoints to flow freely in the marketplace.[173] The

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("[T]he marketplace of ideas model . . . originates in John Milton's 1644 *Areopagitica*." John Stuart Mill then elaborated on the marketplace of ideals model over 200 years later in *On Liberty*."); JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 69 (H.B. Cotterill ed., MacMillan & Co, Ltd. 1959) (1644) (ebook) ("And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"); JOHN STUART MILL & JEAN BETHKE ELSHTAIN, ON LIBERTY 118 (David Bromwich, & George Kateb, Yale University Press 2003) (1859) (ebook), *available at* ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/miami/detail.action?docID=3420105. The term "marketplace of ideas," as we know it today, however, began its development with Justice Holmes' "free trade in ideas," which was then adapted by Justice Brennan into "marketplace of ideas." *See* David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 891 (1986) (noting the importance of the Court's increasing use of Justice Brennan's phrase "marketplace of ideas" rather than Holmes' "free trade in ideas."); Christoph Bezemek, *The Epistemic Neutrality of the "Marketplace of Ideas": Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159, 173 (2015) (asserting that "[t]he influence Milton and Mill had on Holmes's thought cannot be denied").

[169] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960) ("The primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counter-belief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves.").

[170] *See* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 881 (1994).

[171] *See* Kraski, *supra* note 1, at 930.

[172] *See* Calvert, *supra* note 168, at 124 nn.184–85 (discussing marketplace of ideas theory in contemporary Supreme Court case law (citing W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40, 47 (1996))).

[173] *See id*. at 124.

second theory, the promotion of democratic self-government,-promulgates the idea that the free flow of information helps us to vote wisely by providing complete access to knowledge and opinions to inform our own votes.[174] Like the marketplace theory, this theory emphasizes the free flow of information.[175] Third, the theory of free speech as the promotion of individual autonomy and self-expression also propagates the idea that freedom of speech helps develop individual expression and "self-realization."[176] In other words, freedom of speech is necessary for a person to develop personality and to, thus, make informed life decisions.[177] The last, most important value justifying the right to guaranteed freedom of expression is the innate aversion to government oversight.[178] Underlying many decisions to uphold free speech—such as protecting hate speech or lies—is the notion that the social cost of any form of government censorship will invariably exceed the benefit of regulating the arguably harmful speech.[179] As Justice Kennedy wrote in *United States v. Alvarez*: "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."[180] The Supreme Court and scholars

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[174] Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 254–55 (1961) ("Self-government can exist only insofar as the voters acquire the intelligence . . . that, in theory, casting a ballot is assumed to express."); *see* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (2000); *see also* Calvert, *supra* note 168, at 131.

[175] *See* MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, *supra* note 174, at 25 (using a metaphor of a town meeting to illustrate theory that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said"); Meiklejohn, *The First Amendment Is an Absolute*, *supra* note 174, at 257.

[176] *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (stating that free speech should be protected because it "fosters self-realization" and "self-determination").

[177] *See id.*

[178] *See* Kraski, *supra* note 1, at 930.

[179] *See* Ronald J. Krotoszynski, Jr., *Questioning the Value of Dissent and Free Speech More Generally: American Skepticism of Government and the Protection of Low-Value Speech*, *in* DISSENTING VOICES IN AMERICAN SOCIETY: THE ROLE OF JUDGES, LAWYERS, AND CITIZENS 221–22 (Austin Sarat ed., 2012).

[180] United States v. Alvarez, 567 U.S. 709, 723 (2012) (citing G. ORWELL, NINETEEN EIGHTY-FOUR (1949) (Centennial ed. 2003)).

alike have supported and relied upon all of these theories to develop modern Free Speech doctrine. [181]

B. *Free Speech Jurisprudence*

When presented with a First Amendment challenge, the Supreme Court will engage in a certain analysis. First, the Court will determine whether the speech at issue is protected under the First Amendment.[182] Under modern free speech doctrine, not all categories of speech are worthy of protection.[183] The Court has determined that certain categories of speech provide such little social value, and also cause so much harm, that there is no benefit in protecting them.[184] For example, obscenity, child pornography, speech that incites imminent lawless action, and fighting words do not deserve protection.[185] The Supreme Court has also declined to add new

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[181] *See* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and Reasonableness Balancing*, 8 ELON L. REV. 291, 291 (2016). This Note also defines the term "modern" as "beginning with the Warren Court in 1954." *Id.*

[182] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[183] *See id.* (establishing a two-pronged test to evaluate speech acts: (1) speech may not be prohibited if it "is directed to inciting or producing imminent lawless action" and (2) it "is likely to incite or produce such action."); Miller v. California, 413 U.S. 15, 23–24 (1973) (holding that obscene material is not protected by the First Amendment); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964) (providing substantial protection for speech about public figures, but not defamatory speech); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (holding that "the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (establishing that words causing a direct harm to their target and could be construed to advocate an immediate breach of the peace are "'fighting words'" and are not protected by the First Amendment); New York v. Ferber, 458 U.S. 747, 756–64 (1982) (finding a statute targeted against child pornography does not violate First Amendment); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (holding that a "political hyperbole" is not a "true 'threat'" and is thus protected by the First Amendment).

[184] *Chaplinsky*, 315 U.S. at 571–72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem . . . . It has been well observed that such utterances . . . are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

[185] *See* Kelso, *supra* note 181, at 324; *Ferber*, 458 U.S. at 756–64.

categories of speech to this list.[186] Overall, modern free speech doctrine protects unpopular ideas[187] and offensive modes of expression[188]—even lies.[189]

Once the Court determines whether the speech at issue is protected or falls under one of the categories listed above, the Court

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[186] *See* United States v. Alvarez, 567 U.S. 709, 727 (2012) (declining to add lies as a new excepted category of speech).

[187] *See N.Y. Times*, 376 U.S. at 271, 273. In *N.Y. Times v. Sullivan*, an Alabama jury returned a verdict against the New York Times in favor of a police commissioner who claimed he was libeled by an advertisement. *Id.* at 256. The advertisement protested the police department's treatment of civil rights workers, including Dr. Martin Luther King, Jr., and stated that Mr. King was arrested seven times, when in fact he had been arrested four. *Id.* at 259. The Alabama court found this misstatement of fact was sufficient to establish a claim for libel. *Id*. at 262. However, the Supreme Court ruled that the lower court's application of libel law unduly inhibited public discourse. *Id.* at 264. Justice Brennan, who is thought to be the chief architect of modern free speech doctrine, stated that "debate on public issues should be uninhibited, robust, and wide open." *Id.* at 270; *see also Brandenburg*, 395 U.S. at 449 (reversing conviction of a Ku Klux Klan leader for violating a state statute that outlawed advocacy of violence or terrorism as a means of political reform). The Court in *Brandenburg* established that a person cannot be punished for advocacy of violent activity unless it creates direct incitement or "imminent lawless action." *Id*. at 447. The Supreme Court's decisions in *N.Y. Times* and *Brandenburg* impose strict Frist Amendment safeguards.

[188] Cohen v. California, 403 U.S. 15, 22–26 (1971) (5-4 decision) (extending strong First Amendment protection to the use of language or symbols that society finds offensive). In *Cohen*, a young antiwar protester was convicted of breach of the peace for wearing a jacket emblazoned with the message "'Fuck the Draft.'" *Id.* at 16. Speaking for the majority, Justice Harlan wrote that Cohen is protected by the Constitution from "arbitrary government interference" and that the government has no power to regulate the "substantive message" Cohen wishes to convey. *Id*. at 19. The Court also emphasized that not all speech is given "absolute protection," but that the current case is "not an obscenity case" which requires specifically "erotic," "obscene expression." *Id.* at 19–20. Nor is it an incitement to violence case. *Id.* at 22–23. Similarly, in *Texas v. Johnson*, the Court again protected the use of symbols by establishing that there is a Constitutional right to burn an American flag as a form of political protest. Texas v. Johnson, 491 U.S. 397, 418 (1989) (5-4 decision).

[189] *See Alvarez*, 567 U.S. at 727 ("The response to the unreasoned, the rationale; to the uniformed, the enlightened; to the straight-out lie, the simple truth").

then determines which level of review to apply.[190] The level of review will depend on whether the regulation is content-based or content-neutral.[191] If there is any content-based[192] regulation by the government, the Court will use strict scrutiny review.[193]

In sum, two aspects of modern free speech doctrine that are important for this Note are: (1) content-based regulations of speech are reviewed using strict scrutiny,[194] and (2) unless speech falls into an existing excepted category, it will be given first amendment protection.[195] The next sub-Parts will explore both points and illustrate why most speech regulations subject to strict scrutiny fail.

1. STRICT SCRUTINY

U.S. constitutional jurisprudence places a high value on Free Speech.[196] Any content-based regulation of speech is presumed

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[190] There are other factors, while not relevant to this Note but are still important to note, that a court will look to when determining which level of review to apply. *See* Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 908 (1991). For instance, if the speech at issue took place in a public forum or private-individual property, and there is content-based regulation consisting of either viewpoint discrimination or subject matter discrimination, the Court will use strict scrutiny review. *Id.* In general, content-based restrictions on speech—laws that "appl[y] to particular speech because of the topic discussed or the idea or message expressed"—are presumptively unconstitutional and subject to strict scrutiny. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). Additionally, if the regulation is content-neutral, the Court will use an intermediate review. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 790–91 (4th ed. 2011) (ebook) ("Under intermediate scrutiny, a law is upheld if it is *substantially related to an important government purpose*.").

[191] *See* Kelso, *supra* note 181, at 293, 295.

[192] *Reed*, 576 U.S. at 172–73 (holding that a town's Sign Code was content-based regulation because rules within code applied specifically to messages of the sign).

[193] *See* CHEMERINSKY, *supra* note 190, at 791 ("Under strict scrutiny, a law will be upheld *if it is necessary to achieve a compelling government purpose*.").

[194] *See supra* Part III.B.1.

[195] *See* Kelso, *supra* note 181, at 324; New York v. Ferber, 458 U.S. 747, 756–64 (1982); Part III.B.2.

[196] *See* Dworkin, *supra* note 67 ("The United States stands alone even among democracies, in the extraordinary degree to which its [C]onstitution protects freedom of speech and of the press.").

unconstitutional.[197] The Court, therefore, reviews government interference under strict scrutiny.[198] The burden is placed on the government to overcome strict scrutiny by proving that the regulation at issue advances compelling or overriding government ends and is narrowly tailored to advance those ends.[199]

As an initial matter, to overcome strict scrutiny, the government must prove that the content-based regulations were enacted to further a compelling purpose.[200] The Court has found that the following interests are sufficiently compelling: protecting the integrity of the voting system,[201] protecting against discrimination of women[202] or

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[197] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) ("Content-based regulations are presumptively invalid."); *see also* Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 94 (1972) (Court established unconstitutionality of content-based regulation). In *Mosley*, the question before the Court was whether a state law banning all peaceful picketing outside of a high school except for labor dispute protests, violated the First Amendment. *Id*. at 93–94. The Court stated that the ordinance "describ[ed] permissible picketing in terms of its subject matter," and that the government has "no power to restrict expression because of its message." *Id*. at 95. The ordinance, rather than describing picketing as impermissible because of time, place, or circumstance, stipulated certain picketing as illegal based on the message's content. *Id*. The distinguishing of general peaceful picketing from labor picketing, therefore, restricts speech in an unconstitutional way. *Id*. The Court further emphasized that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id*. at 96.

[198] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995) ("[T]he government may not regulate speech based on its substantive content or the message it conveys."); CHEMERINSKY, *supra* note 190, at 791–92.

[199] *See* CHEMERINSKY, *supra* note 190, at 791–92 ("Under strict the government has the burden of proof. That is, the law will be struck down unless the government can show that the law is necessary to accomplish a compelling government purpose.")

[200] Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."). *See* CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW 1101–02 (2007) (e-treatise), https://libguides.stcl.edu/ld.php?content_id=36280424.

[201] Burson v. Freeman, 504 U.S. 191, 196–98 (1992) (finding that a statute restricting the areas around voting polling places is necessary to serve the interest in protecting the right to vote freely and effectively).

[202] *See* Bd. of Dirs. v. Rotary Club, 481 U.S. 537, 549 (1987) (holding that the interest in eradicating discrimination against women and assuring that women have access to business contacts is sufficiently "compelling").

promoting gender equality,[203] protecting the well-being of children,[204] and protecting captive audiences from offensive communication.[205] In contrast, the Court has found the following interests not to be compelling: promoting respect for the American flag[206] and protecting a non-captive audience from being offended.[207]

The second element necessary to overcome strict scrutiny is to show that the regulation is absolutely necessary to achieve the desired end.[208] The government must prove, therefore, that there are no alternative, less restrictive means to further its compelling interest.[209] For instance, in *Boos v. Barry*,[210] the government regulation at issue was a prohibition on the display of any sign within 500 feet of a foreign embassy if that sign tended to bring that foreign government into "'public odium'" or "'public disrepute.'"[211] The Court found that the law at issue was unnecessarily restrictive, because there was an equally effective yet less speech-restrictive law[212] already passed by Congress. The alternative law effectively protected foreign diplomats from harassing behavior[213] while not infringing

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[203] *See* Roberts v. United States, 468 U.S. 609, 623 (1984) (finding "that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact" of a state statute on a male members' association).

[204] *See Sable Commc'ns of Cal.*, 492 U.S. at 126 ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors.").

[205] *See* Carey v. Brown, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.").

[206] *See* Texas v. Johnson, 491 U.S. 387, 418 (1989)*; see also* United States v. Eichman, 496 U.S. 308, 311 (1990).

[207] *See* Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 533–34 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 211–12 (1975); Cohen v. California, 403 U.S. 15, 22–26 (1971).

[208] *See Sable Communications of Cal.*, 492 U.S. at 126. The Court sometimes uses "narrowly tailored" or "carefully tailored" as synonyms for "necessary." *Id*.

[209] *See id.*

[210] *See* Boos v. Barry, 485 U.S. 312 (1988).

[211] *See id*. at 316 (quoting D.C. Code § 22–1115 (1981 ed.)).

[212] *See id.* at 312; 18 U.S.C. § 112(b)(2).

[213] *See Boos,* 485 U.S. at 325 ("§112 was developed as a deliberate effort to implement our international obligations."). The law subjects to criminal punishment willful acts or attempts to "'intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties.'" *Id*. at 325–26 (quoting 18 U.S.C. § 112(b)(2)).

on free speech rights.[214] The government failed to show why this alternative, less restrictive law was insufficient as an alternative to the one at issue.[215]

2. LIES AND HATE SPEECH ARE AFFORDED FREE SPEECH PROTECTION

As a general rule, the First Amendment protects "all forms of communication."[216] As mentioned earlier, there are a few exceptions to this rule: obscenity, child pornography, speech that incites imminent lawless action, and fighting words, are all outside First Amendment protection.[217] Lies, hate speech, and propaganda are not included in this list.[218] In 2012, the Supreme Court established, in *Alvarez*,[219] that there is no general First Amendment exception for false statements and declined to create a new category for them.[220] The plaintiff, Xavier Alvarez, announced in a speech that he received the Congressional Medal of Honor when in fact he did not.[221] Alvarez was then indicted under the Stolen Valor Act (the "Act"), which made it illegal to lie about receiving military decorations or medals.[222] Having established that false speech fell under the

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[214] *See id.* at 326 ("First and foremost, § 112 is not narrowly directed at the content of speech but at any activity, including speech, that has the prohibited effects. Moreover, § 112, unlike § 22–1115, does not prohibit picketing; it only prohibits activity undertaken to 'intimidate, coerce, threaten, or harass.'" (citing 18 U.S.C. § 112(b)(2))).

[215] *Id*. at 321, 324, 327.

[216] *Tinker v. Des Moines: What is Symbolic Speech? When is it Protected?*, LANDMARK CASES, https://www.landmarkcases.org/tinker-v-des-moines/tinker-v-des-moines-what-is-symbolic-speech-when-is-it-protected.

[217] *See* Kelso, *supra* note 181, at 324; New York v. Ferber, 458 U.S. 747, 756–64 (1982).

[218] *See* Kelso, *supra* note 181, at 324; *Ferber*, 458 U.S. at 756–64. In contrast, the GFCC has recognized that these same categories of speech fall outside the purview of Basic Law protection when their use interferes with other enumerated rights. *See supra* Part II.

[219] *See* United States v. Alvarez, 567 U.S. 709 (2012).

[220] *See id.* at 718 ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.").

[221] *Id*. at 713.

[222] *Id.* at 713–14.

protection of the First Amendment,[223] the Court concluded that the law must be examined under strict scrutiny.[224] To satisfy its burden, the government argued that the Act was similar to other constitutional restrictions on false statements, including false statements made to a government official, perjury, and falsely representing a government official.[225] The Court rejected this argument, stating that the listed examples, unlike the Act, each carry a higher purpose than a general restriction on false statements.[226] The government, moreover, failed to show that the Act implemented the least restrictive means to achieving this end.[227] For instance, the government did not show why lesser restrictive means, such as refutation of the false statement or an online database of Medal of Honor winners, are not more appropriate.[228]

Additionally, as the Court made clear in *R.A.V. v. City of St. Paul*, hate speech remains protected under the First Amendment.[229] In *R.A.V.*, the Supreme Court struck down a city ordinance that banned the display of any symbol that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender."[230] Delivering the opinion for the Court, Justice Scalia emphasized that, while burning a cross may be categorized as "fighting words," an unprotected category of speech,[231] the statute was still unconstitutional because it represented impermissible viewpoint discrimination.[232] While the

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[223] *See id.* at 719 ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.").

[224] *See Alvarez*, 567 U.S. at 724.

[225] *Id*. at 719–20.

[226] *See id*. at 721.

[227] *See id*. at 728.

[228] *See id*. at 729.

[229] R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

[230] *Id.* at 380 (quoting S. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). The statute specifically banned: the display of "'a burning cross[,] or Nazi swastika, [or other symbol] which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender.'" *Id.*

[231] *Id.* at 393.

[232] *See id.* at 391. In *Brandenburg v. Ohio*, the Court established that violence must be imminent before hateful speech may be proscribed. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

burning of the cross fell into an unprotected category of speech, the statute was still discriminating only against *hateful* viewpoints within the unprotected category.[233] In other words, the government cannot discriminate against viewpoint-based hate speech even within an unprotected category.[234] The decision highlights the Court's unwillingness to place hate speech into an existing category of unprotected speech.

Years later, in *Virginia v. Black*,[235] the Court actually upheld a Virginia ordinance outlawing cross burnings done with the intent to intimidate.[236] Rather than overturning *R.A.V.*, the *Black* Court distinguished the case at hand by finding that the Virginia statute at issue applied without regard to the viewpoint of the cross burner.[237] The Court, therefore, classified the burning of a cross with the intent to intimidate as a "true threat," a category of speech not protected under the First Amendment.[238] As it stands, under *R.A.V.*, and still under *Black*, hate speech is afforded First Amendment protection, unless it can be shown to be a "true threat."[239]

Unless the Supreme Court recognizes propaganda as an unprotected category of speech, it too falls under the protection of the Free Speech Clause.[240] Therefore, the government must show that the propaganda speech at issue falls within an already excepted category of speech.[241] In *R.A.V.*, for instance, the Court was unwilling to place hate speech into an already excepted category; therefore, any government regulation of racially motivated, or otherwise hateful

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233 *R.A.V.*, 505 U.S. at 377, 391–92.

234 *See id.*

235 Virginia v. Black, 538 U.S. 343 (2003).

236 *Id.* at 363 ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.").

237 *Id.* at 362 (reasoning that the "Virginia statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics'" of race, gender, religion, or political affiliation, but rather solely focuses on whether intimidation was intended).

238 *Id*. at 360.

239 *Id.* at 363; *see R.A.V.*, 505 U.S. at 377, 391–92.

240 Lincoln Caplan, *Should Facebook and Twitter Be Regulated Under the First Amendment?*, WIRED (Oct. 11, 2017, 7:00 AM), https://www.wired.com/story/should-facebook-and-twitter-be-regulated-under-the-first-amendment/.

241 *See R.A.V.*, 505 U.S. at 383.

viewpoints, failed constitutional review.[242] Following *R.A.V.*, if the government cannot sufficiently argue that propaganda online falls into one of these excepted categories, any law banning it would have to advance a compelling government interest and be narrowly tailored—a conclusion this speech-protective Supreme Court is unlikely to make.[243] The next Part further explores this question of whether propaganda could be placed in an already excepted category of speech, or if the Court is more likely to find that it is protected under the First Amendment.

IV. WOULD THE NETWORK ENFORCEMENT ACT BE UNCONSTITUTIONAL IN THE UNITED STATES?

As discussed above, German freedom of expression under the Basic Law differs from its U.S. counterpart in significant ways. First, in Germany, free speech is explicitly limited by the text of the Basic Law, whereas the U.S. Constitution has no written limits.[244] Second, there are far more exceptions to protected speech under German jurisprudence, whereas the categories of unprotected speech in the United States are extremely limited.[245] Keeping these differences in mind, an important question arises: whether an act regulating propaganda, like the Network Enforcement Act,[246] would be deemed unconstitutional in U.S. courts.

To answer this question, a two-part analysis must be employed.[247] First, it must be determined whether the First Amendment

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[242] *See id.* at 391–92 ("One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.' St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

[243] *See id.* at 381, 399.

[244] *Compare* [GG] [BASIC LAW], *supra* note 7, art. 1, § 1 ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."), *with* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

[245] *Compare supra* Part II.C, *with supra* Part III.A.

[246] NetzDG, *supra* note 6, at § 3(2).

[247] Russell W. Galloway, *Basic Constitutional Analysis*, 28 SANTA CLARA L. REV. 775, 779 (1988). The two-part structure of the analysis is the same for all constitutional limits. *See id.* In applying any constitutional restriction on

protects the regulated speech at issue or if the speech falls into an unprotected category.[248] Then, it must be determined what level of scrutiny applies, depending on whether the law is content-based or content-neutral.[249] For the purposes of this Note, I will be examining whether a law requiring social media companies to remove "propaganda" specifically would be unconstitutional in the United States. Focusing on "propaganda" (which is one of the types of speech banned by the NEA),[250] narrows the scope of the analysis while still encompassing a type of speech that falls under the broad term of "fake news."

A. *Is Propaganda Protected Speech?*

While there is no set definition for propaganda,[251] there is a general consensus that "propaganda attempts to influence the thinking of people."[252] For the purposes of this Note, propaganda is defined as false or misleading facts for the purpose of manipulating reality.[253] The two most important aspects of propaganda are (1) it is self-serving, meaning it is meant to benefit the speaker, not the

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government action, one should ask first whether the limit is applicable—e.g., is this the kind of government action that is subject to this limit—and second, whether the respondent complied with the rules the Supreme Court has developed for enforcing the limit. *Id.* at 783–84. In short, the analysis on the merits of any constitutional limit focuses on two questions: (1) "applicability" and (2) "compliance." *Id.* at 779.

248 *Supra* Part III.

249 *Id.*

250 *See* Tahira Mohamedbhai, *Germany Cabinet Approves Bill for Social Medial Platforms to Report Hate Speech to Authorities*, JURIST (Feb. 21, 2020, 9:03 AM), https://www.jurist.org/news/2020/02/germany-cabinet-approves-bill-for-social-medial-platforms-to-report-hate-speech-to-authorities/.

251 S*ee, e.g.*, *Propaganda*, 13 DIG. INT'L L. 982 (1968) (listing various definitions of propaganda).

252 *Id.* at 982–83 (quoting L. John Martin, *International Propaganda* 199 (1958)).

253 *See* Meese v. Keene, 481 U.S. 465, 490 (1987) (Blackmun, J., dissenting in part) ("[D]eclaration of Leonard W. Doob, Sterling Professor Emeritus of Psychology at Yale University: . . . .'[A]s the history of the last seventy years suggests, to call something propaganda is to assert that it communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods or *[sic]* being employed; that its dissemination is systematic and organized in some way.'").

listener; and (2) it manipulates the audience in some way—it might be through lying or by appealing to racism or other base emotions.[254]

With this definition in mind, the question of whether propaganda is protected speech under the First Amendment must be answered. As discussed in the preceding Part, in general, all communication and association for purposes of communication are protected by the First Amendment.[255] Certain categories of speech, however, are not protected. These exceptions include criminal speech, incitement, fraud, fighting words, obscenity, child pornography, and commercial speech that is misleading or solely concerned with illegal activity.[256] Exceptions are extremely limited, and are "confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'"[257] Noticeably missing from this exhaustive list are lies[258] and hate speech[259]—categories under which propaganda, as defined for purposes of this Note, could fall.

In *R.A.V.*, the Court considered whether hate speech would be protected under the First Amendment and ultimately decided that hate speech did not fall under any of the excepted categories of

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[254] *See* Corbin, *supra* note 15 (manuscript at 9–11) (defining key characteristics of propaganda to be "manipulativeness"—intentionally undermining reasoned analysis, specifically by relying on falsehoods—and self-serving in nature).

[255] *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). As the Court stated in *Mosley*, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.*

[256] *See* Kelso, *supra* note 181, at 324; New York v. Ferber, 458 U.S. 747, 756–64 (1982).

[257] *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (first citing United States v. Stevens, 559 U.S. 460, 470 (2010); and then quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1992) (Kennedy, J., concurring)).

[258] *See id.* at 718. In contrast, the Supreme Court has reiterated that lies are protected speech. *See id.* at 718 ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.").

[259] *See* Matal v. Tam, 137 S. Ct. 1744, 1763 (2017). In fact, the Supreme Court unanimously reaffirmed in *Matal v. Tam* that there is no hate speech exception to the First Amendment. *Id.* ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (quoting Street v. New York, 394 U.S. 576, 592 (1969))).

speech.[260] Similarly, in *Alvarez*, the Court rejected to categorize lies as excepted speech or to place it within an already established category.[261] Here, propaganda shares similarities with both lies and hate speech and would likely be categorized the same way: as protected speech. The Court has been explicitly reluctant to add new categories of exceptions.[262] Under U.S. free speech doctrine, propaganda, therefore, would likely be categorized by the Court as protected speech.[263]

B. *What Level of Scrutiny Should be Applied?*

The next step in analyzing whether a law regulating propaganda online is constitutional hinges on the level of scrutiny the Court may apply.[264] In order for a regulation to be content-neutral, it must be both viewpoint-neutral and subject-matter neutral.[265] In other words, the government cannot regulate speech based on the ideology of the message[266] or the topic of the speech.[267] In *Reed v. Town of Gilbert*, the Court defined content-based regulation as "a law [that] applies to particular speech because of the topic discussed or the idea or message expressed."[268] The Court, therefore, must consider whether a law "draws distinctions based on the message a speaker

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[260] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391–94 (1992).

[261] *See Alvarez*, 567 U.S. at 717 (first citing United States v. Stevens, 559 U.S. 460, 470 (2010); and then quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1992) (Kennedy, J., concurring)).

[262] *See* Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 791 (2011) ("[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." (citing United States v. Stevens, 559 U.S. 460, 469–72 (2010))).

[263] *See Alvarez*, 567 U.S. at 709.

[264] *See supra* Part III.1.B.

[265] *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45, 57, 59, 61 (1983).

[266] *See* Boos v. Barry, 485 U.S. 312, 312, 333–34 (1988) (declaring unconstitutional a District of Columbia ordinance that prohibited display of signs critical of a foreign government within 500 feet of that government's embassy).

[267] *See* Carey v. Brown, 447 U.S. 455, 471 (1980) (finding a law prohibiting all picketing in residential neighborhoods, unless it was labor picketing connected to a place of employment, unconstitutional); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 827 (2000) (finding that a law regulating only sexual speech was a subject matter, or content-based, restriction and had to meet strict scrutiny review).

[268] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

conveys."[269] In *Reed*, the town's sign code placed limits on temporary directional signs, regulating how long the signs could be displayed and the size.[270] However, other signs, such as political or ideological, were not regulated.[271] The Court emphasized that the restrictions on any sign, therefore, depend solely on the content of the message on the sign.[272] Based on the Court's analysis and holding in *Reed*, a law requiring the removal of posts containing propaganda on social media would also be content-based regulation. For instance, a post is defined as propaganda solely based on whether the post contains a self-serving, manipulative, and false political message.[273] This determination, to put it in the Court's own words, would be based "entirely on the communicative content of the sign."[274] Moreover, propaganda posts would be removed, whereas other posts with different messages would not. Under *Reed*, subjecting certain posts to different treatment based on the ideas conveyed is content-based regulation of speech.[275] Therefore, strict-scrutiny must be applied to any law requiring the removal of propaganda posts from social media.[276]

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269 *Id.*

270 *Id.* at 155.

271 *Id.* at 167.

272 *Id.* at 163–64 ("The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government.").

273 *See* Corbin, *supra* note 15 (manuscript at 9–11).

274 *Id.* at 164.

275 *Id.* at 168–69, 171, 173.

276 *See id.* at 172. Additionally, it is important to note that while the Supreme Court has not expressly held that Internet speech has more protection than any other speech, the language in *Packingham v. North Carolina* arguably indicates that the Court intends to keep Internet speech relatively unregulated. 137 S. Ct. 1730, 1737 (2017). ("Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind . . . . North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.").

C. *Can the Government Overcome Strict Scrutiny?*

To meet the requirements of strict scrutiny, the government must prove that the regulation at issue: (1) advances a compelling or overriding government ends and (2) is the least restrictive, most effective means to advance those ends.[277] As to the first prong, the proposed statute asserts a government interest in preserving the democratic order. By eliminating propaganda, the government would be protecting the voters' decision-making processes and, thus, ensuring that elections are not swayed by propaganda or fake news.[278]

The government could also argue that there is a compelling interest to uphold the integrity of government elections. It could be argued that the influx of online propaganda interferes with the democratic process as people are unable to genuinely consent-by-vote.[279] The Supreme Court has accepted preserving the integrity of elections as a compelling government interest.[280] In *Burson v. Freeman*, the Supreme Court ruled that a Tennessee statute, forbidding the solicitation of votes and the display or distribution of campaign materials within 100 feet of entrances to polling facilities, survived strict scrutiny.[281] The Court found that there was a compelling governmental interest in "protecting voters from confusion and undue influence"[282] and that the government has an "indisputably . . . compelling interest in preserving the integrity of its election process."[283]

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[277] *See* Galloway, *Basic Free Speech Analysis*, *supra* note 190, at 909.

[278] *See, e.g.*, Storer v. Brown, 415 U.S. 724, 736 (1974) (finding the prevention of factionalism and the stability of political systems as compelling state interests). The Court may accept this as a compelling government interest, because the Court has upheld parallel interests as compelling in the past. *See id.*; Am. Party of Tex. v. White, 415 U.S. 767, 782 n.14 (1974) (finding a compelling state interests in preserving integrity of electoral process and regulating number of candidates on ballot so as to avoid voter confusion).

[279] Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889, 897 (2008) ("If voters are misled, elections may not accurately reflect the desires of the electorate.").

[280] *See* Burson v. Freeman, 504 U.S. 191, 199 (1992) (finding a compelling government interest in protecting its citizen's right to vote freely and effectively).

[281] *See id.* at 193, 207, 213–14.

[282] *See id*. at 199. The Court also emphasized that there is a "'right to vote freely for the candidate of one's choice is of the essence of a democratic society.'" *Id*. (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

[283] *Id.* at 196 (quoting Eu v. S.F. City Democratic Cent. Comm., 489 U.S. 214, 228–29 (1989)).

Not only did the government in *Burson* show that there was a compelling interest in protecting voters from undue influence, but the government also showed that the statute was narrowly tailored and necessary to serve that interest.[284]

However, to prove there is a compelling interest, as Justice Scalia wrote in *Brown v. Entertainment Merchant Association*, "[t]he State must specifically identify an 'actual problem' in need of solving . . . and the curtailment of free speech must be actually necessary to the solution."[285] Therefore, the government must prove that fake news, specifically propaganda, causes confusion among voters and directly alters the outcome of elections and that eliminating propaganda is necessary to eliminate that confusion.[286] In sum, while preventing corruption and upholding the integrity of democratic elections are compelling interests,[287] the state must show there is actual, concrete risk posed by the dissemination of propaganda on social media.[288]

Even if the Court accepts that there is a compelling government interest behind requiring the removal of propaganda from social media sites, the government must still prove that the statute is the least restrictive means to ensure that end.[289] If there is a less restrictive alternative to accomplish a compelling interest, the statute will not

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[284] *Id.* at 206–11 (finding that based on history of voter fraud and intimidation, and on past findings that interferences right before voting can be significant for a person deciding on a candidate, requiring solicitors to stand 100 feet from polling centers "does not constitute an unconstitutional compromise").

[285] *See* Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 799 (2011) (quoting United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 822 (2000)).

[286] *Id.*; *see* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 822 (2000) (establishing that "the Government must present more than anecdote and supposition"); *see also* United States v. Alvarez, 567 U.S. 709, 725 (2012) ("There must be a direct causal link between the restriction imposed and the injury to be prevented.").

[287] *See* Burson v. Freeman, 504 U.S. 191, 199 (1992).

[288] *See Playboy Ent. Grp., Inc.*, 529 U.S. at 822; *see also Alvarez*, 567 U.S. at 725.

[289] *Brown*, 564 U.S. at 799 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992)) (stating that the government can only meet requirements of strict scrutiny if regulation at issue is justified by a "compelling government interest and is narrowly drawn to serve that interest").

pass strict scrutiny.[290] The government, therefore, has the burden of proving why other methods, such as counter-speech, education, or self-regulation, would not be sufficient in combatting the issue propaganda presents to the democratic process.[291] As the Court in *Burson* emphasized, it is extremely rare for the Court to accept government regulation over another recourse.[292]

Most notably, the Court has required the government to show that counter-speech would not work to achieve its interests.[293] Justice Kennedy in *Alvarez* opined that "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[294] Proving that counter-speech would not be sufficiently effective in combatting the effects of propaganda online would be a difficult burden to overcome, as there are a plethora of legitimate news sources and fact-checking organizations that can work to debunk fake political posts.[295] In addition, the government could itself invest in the creation of government-run fact-checking sites and online political news outlets.[296] It is clear then that the Court would find there are other, less restrictive means to remedy the effect of propaganda on elections.

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[290] *See Playboy Ent. Grp., Inc.*, 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.").

[291] *See id.*; CHEMERINSKY, *supra* note 190, at 792.

[292] *Burson*, 504 U.S. at 211 ("[W]e reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case.").

[293] *See Alvarez*, 567 U.S. at 726.

[294] *Id.* at 727.

[295] *See* POLITIFACT, https://www.politifact.com/; *Fact Checker*, THE WASHINGTON POST, https://www.washingtonpost.com/blogs/fact-Checker/; *Fact Checks*, N.Y. TIMES, https://www.nytimes.com/spotlight/fact-checks.

[296] See *Alvarez*, 567 U.S. at 729. Justice Kennedy in *Alvarez* suggested a similar solution, stating that the government could create a database listing past Medal of Honor recipients, which would protect the integrity of the military awards system while, at the same time, avoiding a restriction on speech. *Id.*

V. THE COUNTER-SPEECH SOLUTION

The Supreme Court has continuously denied government regulation in favor of counter-speech;[297] however, counter-speech in America may not be entirely effective.[298] First, in the age of social media, most people receive their news on Twitter, Facebook, and other social media sites.[299] Each of these online sources utilize extremely sophisticated algorithms that provide every unique user with tailored content based on what that user typically reads, who that user's followers are, and what those followers read or post about.[300] Therefore, as a society, we are only being exposed to information that social media sites have calculated we will be predisposed to agree with and enjoy.[301] The sophistication of social media has essentially done away with the very idea of counter-speech.[302]

Therefore, if the government is unable to regulate what is posted on social media, government regulation of social media algorithms is another way to ensure that there is a free flow of information.[303] Regulations should require that search engines and social media companies make it explicitly known to "users that they are subject to algorithms," detail how the algorithms are filtering posts or search results, and allow users to manually disable or change how the

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297 *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

298 *See* Philip M. Napoli, *What If More Speech Is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 67–68 (2018) (discussing inadequacy of counter-speech in the digital era).

299 *See* Mike Vorhaus, *People Increasingly Turn to Social Media For News*, FORBES (June 24, 2020, 9:51 PM), https://www.forbes.com/sites/mikevorhaus/2020/06/24/people-increasingly-turn-to-social-media-for-news/#10dd99f63bcc.

300 *See* Elizabeth Van Couvering, *Is Relevance Relevant? Market, Science, and War: Discourses of Search Engine Quality*, 12 J. COMPUTER-MEDIATED COMM. 866, 871–72 (2007); Theodora Lau & Uday Akkaraju, *When Algorithms Decide Whose Voices Will Be Heard*, HARV. BUS. REV. (Nov. 12, 2019), https://hbr.org/2019/11/when-algorithms-decide-whose-voice-will-be-heard.

301 *See* Couvering, *supra* note 300, at 875.

302 *See id*.; Lau & Akkaraju, *supra* note 300.

303 *See* Julia K. Brotman, *Access, Transparency, and Control: A Proposal to Restore the Marketplace of Ideas by Regulating Search Engine Algorithms*, 39 WHITTIER L. REV. 33, 50–53 (2018) (discussing regulating algorithms).

content is filtered.[304] These proposed changes would protect informational autonomy, diversity, and quality, as well as the democratic society overall. However, it is unclear whether algorithms can be regulated without violating the Free Speech Clause.[305]

Another possible solution, which does not require any government regulation, would be to invest in the U.S. news infrastructure. Currently, it is almost impossible for Americans to access neutral news sources.[306] Trust in the news media in the United States is extremely low overall[307] because most available news sources are extremely partisan,[308] and the decline of local newspapers has likely only exacerbated the divide. As it stands, for counter-speech to be effective, there needs to be a major shift in American trust of the media. The solution, as proposed in this Note, is to fully invest in our public news networks. Specifically, the government should

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[304] *See id.* at 54. The list set forth by Brotman is more narrowly tailored for search engines, specifically Google, whereas I have expanded the regulation to include social media sites.

[305] *See id.* at 61–62. (discussing the constitutionality of regulating algorithms). According to Brotman, it is likely that algorithms are protected speech under the editorial discretion doctrine. *Id.* However, Brotman goes on to argue that a court should uphold the proposed regulation as a constitutional restriction on speech. *Id.* at 62–63.

[306] *See* The Berlin School of Creative Leadership, *10 Journalism Brands Where You Find Real Facts Rather Than Alternative Facts*, FORBES (Feb. 1, 2017, 1:10 PM), https://www.forbes.com/sites/berlinschoolofcreativeleadership/2017/02/01/10-journalism-brands-where-you-will-find-real-facts-rather-than-alternative-facts/#26503a60e9b5.

[307] *See* Amy Mitchell et al., *Many Americans Say Made-Up News Is a Critical Problem That Needs to Be Fixed*, PEW RSCH. CTR. (June 5, 2019), https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/.

[308] *See* Shawn Langlio, *How Biased is Your News Source? You Probably Won't Agree with This Chart*, MKT. WATCH (Apr. 21, 2018, 9:30 AM), https://www.marketwatch.com/story/how-biased-is-your-news-source-you-probably-wont-agree-with-this-chart-2018-02-28; Julie Bosman, *How the Collapse of Local News Is Causing a "National Crisis,"* N.Y. TIMES (Nov. 20, 2019), https://www.nytimes.com/2019/11/20/us/local-news-disappear-pen-america.html

invest more in the CPB,[309] which includes the Public Broadcasting Network ("PBS")[310] and National Public Radio.[311]

The United Kingdom's BBC network stands as an effective example of a well-funded, well-respected public news organization.[312] According to a Pew Research Center survey about news media and politics in the United Kingdom, British adults, "both those on the ideological right and left, cite the BBC as their main news source."[313] Additionally, in the United Kingdom, around eight-in-ten adults (79%) say they trust the public news organization BBC.[314] In contrast, Pew Research Center explored the attitude towards news media in the United States, finding that out of thirty main-stream media organizations, not a single one was "trusted by more than 50% of all U.S. adults."[315]

The BBC is based on a Royal Charter,[316] granting incorporation and full independence to act solely "in the public interest, serving all audiences through the provision of impartial, high-quality and distinctive output and services which inform, educate and

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309 About Public Media, CPB, https://www.cpb.org/aboutpb (last visited Dec. 20, 2020).

310 PBS, https://www.pbs.org (last visited Dec. 20, 2020).

311 NPR, https://www.npr.org (last visited Dec. 20, 2020).

312 *See* BBC, https://www.bbc.com/news/world-europe-18027956 (last visited Dec. 20, 2020).

313 Amy Mitchell et al., *Fact Sheet: News Media and Political Attitudes in the United Kingdom*, PEW RSCH. CTR. (May 17, 2018), https://www.pewresearch.org/global/fact-sheet/news-media-and-political-attitudes-in-the-united-kingdom/.

314 *Id.*

315 *U.S. Media Polarization and the 2020 Election: A Nation Divided*, PEW RSCH. CTR. (Jan. 24, 2020), https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/.

316 DEPARTMENT FOR CULTURE, MEDIA AND SPORT, COPY OF THE ROYAL CHARTER FOR THE CONTINUANCE OF THE BRITISH BROADCASTING NETWORK, Dec. 2016 [hereinafter CHARTER FOR THE CONTINUANCE OF BBC], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577829/57964_CM_9365_Charter_Accessible.pdf; *see* Letter to Lord Chancellor on the granting of a Royal Charter to the BBC from The Earl of Belfour (Nov. 19, 1926), https://www.nationalarchives.gov.uk/education/resources/twenties-britain-part-two/royal-charter-for-bbc/.

entertain."[317] The BBC is further regulated by Ofcom,[318] the communications regulatory authority in the United Kingdom.[319] Ofcom sets forth various rules and regulation to ensure the impartiality of the BBC, such as the Ofcom Broadcasting Code ("the Code").[320] Under Section 5 of the Code: "[N]ews, in whatever form, must be reported with due accuracy and presented with due impartiality."[321] The BBC is a unique organization. While funded by taxes,[322] the BBC is set up as an independent corporation, yet it still must adhere to certain rules and regulations[323] to ensure its impartiality and its mission as an organization purely for the people.[324] Despite its distinctiveness as a quasi-government organization, or perhaps because of it, the BBC is cited as the main news source for people on both left and right ideologies in the United Kingdom.[325]

While the United States does in fact have a public news system,[326] it lacks the reach the BBC commands.[327] The disparity in viewership most likely stems from the gap in funding between the

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317 CHARTER FOR THE CONTINUANCE OF BBC, *supra* note 316, at art. 3, § 5.

318 *Id*. at art. 44; Ofcom Broadcasting Code, Jan. 2019 [hereinafter Ofcom Broadcasting Code], https://www.ofcom.org.uk/__data/assets/pdf_file/0016/132073/Broadcast-Code-Full.pdf.

319 Communications Act 2003 c. 198 (Eng.) http://www.legislation.gov.uk/ukpga/2003/21/section/198.

320 Ofcom Broadcasting Code, *supra* note 318.

321 *Id.* at § 5.

322 *See* BBC, *License Fee and Funding*, https://www.bbc.com/aboutthebbc/governance/licencefee (last visited Dec. 20, 2020).

323 *See* Ofcom Broadcasting Code, *supra* note 318.

324 *About the BBC*, BBC, https://www.bbc.com/aboutthebbc/governance/mission (last visited Dec. 20, 2020).

325 *Fact Sheet: News Media and Political Attitudes in the United Kingdom*, *supra* note 273. This is in direct contrast to the U.S., where people on different sides of the ideological spectrum choose different news sources. *See U.S. Media Polarization and the 2020 Election: A Nation Divided*, *supra* note 315.

326 *See* 47 U.S.C. § 396 (1967). Under the Public Broadcasting Act of 1967, Congress created the CPB, which consists of PBS and NPR. *See id.*; *see also CPB FAQ*, https://www.cpb.org/faq (last visited Dec. 20, 2020) ("CPB is the steward of the federal government's investment in public media.").

327 PBS reaches approximately 109 million viewers each month, whereas the BBC reaches 426 million people weekly. *Overview*, PBS, http://about.lunchbox.pbs.org/about/about-pbs/overview/ (last visited Dec. 20, 2020); BBC, GROUP ANNUAL REPORTS AND ACCOUNTS at 12, 48, 50, 52 (2018–2019), https://downloads.bbc.co.uk/aboutthebbc/reports/annualreport/2018-19.pdf.

two entities. For instance, PBS is funded mostly by government grants and private donations.[328] PBS brings in approximately $600 million a year in funding,[329] compared to the over £3 billion the BBC receives from a licensing tax.[330] To truly combat the effects of fake news in the United States, and to ensure that counter-speech is actually effective, the U.S. government needs to fund the CPB and PBS more appropriately. With nearly 600% more funding than PBS, it is no surprise that the BBC's reach is similarly proportioned.

Another important difference between the BBC and PBS is the regulation structure. The BBC is regulated by Ofcom and the strict "rules of impartiality" it sets;[331] however, the CPB and PBS are not similarly regulated.[332] The public news in the United States does not have the same impartiality standards as the United Kingdom. [333] If counter-speech is going to be used as an effective tool against fake news, there must be a reliable, impartial, news source to command the trust and respect of viewers within the United States.

Overall, if it is not possible to combat the fake news problem in the United States through government regulation, then the United States must invest in its news infrastructure to ensure there is sufficient informational diversity and quality.

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328 *See* PBS, PUBLIC SERVICE BROADCAST AND SUBSIDIARIES CONSOLIDATED FINANCIAL STATEMENTS AND INDEPENDENT AUDITOR'S REPORT 5–8, (2019), https://bento.cdn.pbs.org/hostedbento-prod/filer_public/PBS_About/Files%20and%20Thumbnails/Finances/2019%20PBS%20Financial%20Report.pdf.

329 *Id.*

330 BBC GROUP ANNUAL REPORTS AND ACCOUNTS, *supra* note 327 (converts to $3.57 billion in U.S. dollars).

331 *Content Standards*, OFCOM, https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/bbc-operating-framework/content-standards (last visited Dec. 20, 2020).

332 *Compare* 47 U.S.C. § 396(a) (1967), *with* CHARTER FOR THE CONTINUANCE OF BBC, *supra* note 316, at § 44.

333 *See* Fairness Doctrine and Public Interest Standards, Report Regarding Handling of Public Issues, 39 Fed. Reg. 26372, 26374, par. 15 (July 18, 1974) ("'the doctrine' involves a two-fold duty: (1) The broadcaster must devote a reasonable percentage of . . . broadcast time to the coverage of public issues, and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view.") The Fairness Doctrine, which set forth impartiality standards in the United States, was repealed by President Reagan. *See id*.; Dan Fletcher, *A Brief History of The Fairness Doctrine*, TIME (Feb. 20, 2009), http://content.time.com/time/nation/article/0,8599,1880786,00.html.

CONCLUSION

A statute requiring the removal of propaganda material on social media sites, like Germany's NEA, would likely be unconstitutional in the United States. First, the speech at issue, propaganda, is protected by the First Amendment.[334] Second, the regulation in question qualifies as content-based because it only targets a particular type of message and topic.[335] The Supreme Court, moreover, would apply a strict scrutiny review of the statute, a heavy burden for the government to overcome.[336] Under strict scrutiny, the government may be able to prove that there is a compelling government interest in protecting the democratic order and process. However, it is unlikely that the Court will accept the statute as the only means of achieving that end, where other measures, such as counter-speech, are likely to remedy the problem in a less speech-restrictive manner.[337]

However, social media is certainly changing the way we communicate with one another, and the way that we gather information. An argument can therefore be made that U.S. free speech laws are too stringent. As the Court itself has admitted in *Packingham v. North Carolina*, "we cannot appreciate yet" the "full dimensions and vast potential" of the "Cyber Age."[338] While this Note discusses a purely hypothetical statute, it becomes more plausible every day that there may need to be some form of government regulation on social media. The 2016 and 2020 elections, and events throughout 2020 and early 2021, have highlighted the huge role that social media now plays in our politics and society. Yet, as Justice Alito points out in his dissent in *Packingham*, the Court itself has not "heeded its own admonition of caution" regarding the regulation of social media.[339] The language employed by the majority in *Packingham* "indicates that the Court intends to keep Internet speech as unregulated as

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334 *See* United States v. Alvarez, 567 U.S. 709, 727 (2012) (declining to add lies as a new excepted category of speech).

335 *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

336 *Supra* Part III.B.2.

337 *See* United States v. Alvarez, 567 U.S. 709, 729 (2012) (holding that counter-speech was a viable, less restrictive way of protecting the government interest at hand. Specifically, the Court recommended the creation of a database that could list Medal of Honor recipients, and thus protect the integrity of the military from people who lie about receiving such awards).

338 Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).

339 *Id.* at 1744 (Alito, J., dissenting).

possible."[340] There will, in fact, be consequences to this "undisciplined dicta"[341] as the influence of social media continues to rise, and the government lacks any ability to regulate the information exchanged online.

As this Note has explored, an attempt by the government to regulate the dissemination of fake news or, specifically, propaganda would likely be deemed unconstitutional. The very real threat to our democratic order and voting process would thus go unchecked, while countries, such as Germany and the United Kingdom, have taken concrete steps towards regulating the wild west of social media. The longstanding and pervasive distrust of the government that underlies many decisions to uphold free speech in the face of government regulation serves as the greatest barrier to propaganda regulation.[342] A persuasive argument to overcome this barrier is that the cost of government censorship will invariably exceed the cost of regulating (arguably harmful) speech[343] and that reliance on counter-speech is misplaced. Unless there is significant investment in a neutral, reliable news source, counter-speech will simply not be effective in combatting the real issues that fake news causes within our democratic society.

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340 Zipursky, *supra* note 164, at 1345.

341 *Packingham*, 137 S. Ct. at 1738 (Alito, J., dissenting).

342 *See* Krotoszynski, *supra* note 179, at 221–22 (2015) (for analysis of this distrust in America and elsewhere).

343 *See id*.